

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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In Re: Methyl Tertiary Butyl Ether (“MTBE”)
Products Liability Litigation

Master File No. 1:00-1898
MDL 1358 (SAS)
M21-88
ECF Case

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This document relates to the following case:

City of New York v. Amerada Hess Corp., et al.
Case No. 04 Civ. 3417

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**PLAINTIFF CITY OF NEW YORK’S REVISED PROPOSED JURY
INSTRUCTIONS FOR PHASE ONE**

Plaintiff the City of New York (the “City”) hereby submits its Proposed Final Jury Instructions for Phase One of this trial. The City reserves the right to amend these proposed final jury instructions.

I. Proposed Final Instructions

The City proposes that the following final jury instructions be read to the jury following closing statements and before deliberation:

PROPOSED FINAL INSTRUCTION NO. 1

General Introduction

Now that you have heard the evidence and the argument, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it and to apply it to the facts as you find them from the evidence in the case. Do not single out one instruction as stating the law, but consider the instructions as a whole. You are not to be concerned about the wisdom of any rule of law stated by me. You must follow and apply the law.

The lawyers have properly referred to some of the governing rules of law in their arguments. If there is any difference between the law stated by the lawyers and as stated in these instructions, you are governed by my instructions.

Nothing I say in these instructions indicates that I have any opinion about the facts. You, not I, have the duty to determine the facts.

You must perform your duties as jurors without bias or prejudice as to any party.

Authority: 3 Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, *Federal Jury Practice & Instructions*, § 103.01 (5th Ed., 2000 & rev. 2009).

PROPOSED FINAL INSTRUCTION NO. 2

Use of notes

You may use the notes taken by you during the trial. However, the notes should not be substituted for your memory. Remember, notes are not evidence. If your memory should differ from your notes, then you should rely on your memory and not on your notes.

Authority: 3 Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, *Federal Jury Practice & Instructions*, § 103.02 (5th Ed., 2000 & rev. 2009).

PROPOSED FINAL INSTRUCTION NO. 3

All persons equal before the law—Organizations

A corporation, city or city agency is entitled to the same fair trial as a private individual. All persons, including corporations, cities, city agencies and other organizations stand equal before the law, and are to be treated as equals.

Authority: 3 Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, *Federal Jury Practice & Instructions*, § 103.12 (5th Ed., 2000 & rev. 2009) (as modified).

PROPOSED FINAL INSTRUCTION NO. 4

Evidence in the case

Unless you are otherwise instructed, the evidence in the case consists of the sworn testimony of the witnesses regardless of who called the witness, all exhibits received in evidence regardless of who may have produced them, and all facts and events that may have been admitted or stipulated to and all facts and events that may have been judicially noticed.

Statements and arguments by the lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statement, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. However, when the lawyers on both sides stipulate or agree on the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

I may take judicial notice of certain facts or events. When I declare that I will take judicial notice of some fact or event, you must, unless otherwise instructed, accept my declaration as evidence and regard as proved the fact or event that has been judicially noticed.

Any evidence to which I have sustained an objection and evidence that I have ordered stricken must be entirely disregarded.

Authority: 3 Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, *Federal Jury Practice & Instructions*, § 103.30 (5th Ed., 2000 & rev. 2009).

PROPOSED FINAL INSTRUCTION NO. 5

Burden of Proof - Preponderance of the Evidence

Plaintiff the City has the burden in a civil action, such as this, to prove its claims regarding Station 6 by a preponderance of the evidence.

To “establish by a preponderance of the evidence” means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true.

The preponderance of the evidence is not alone determined by the number of witnesses, nor the amount of testimony or documentary evidence, but rather the convincing character of the testimony and other evidence, and the inferences reasonably to be drawn therefrom, weighed by the impartial minds of the jury.

In determining whether any fact in issue has been proved by a preponderance of the evidence you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Authority: 3 Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, *Federal Jury Practice & Instructions*, § 104.01 (5th Ed., 2000 & rev. 2009) (as modified).

PROPOSED FINAL INSTRUCTION NO. 6

Credibility of Witnesses

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence contrary to the testimony.

You should carefully examine all the testimony given, the circumstances under which each witness has testified, and every matter in evidence tending to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while testifying.

Consider the witness' ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Also, consider any relation each witness may have with either side of the case, the manner in which each witness might be affected by the decision in this case, and the extent to which the testimony of each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons seeing an event may see or hear it differently.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, that you may think it deserves. In short, you may accept or reject the testimony of

any witness, in whole or in part.

In addition, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

Authority: 3 Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, *Federal Jury Practice & Instructions*, § 105.01 (5th Ed., 2000 & rev. 2009).

PROPOSED FINAL INSTRUCTION NO. 7

Impeachment—Inconsistent statements or conduct

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something that is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness' other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is “knowingly” done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Authority: 3 Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, *Federal Jury Practice & Instructions*, § 105.04 (5th Ed., 2000 & rev. 2009).

PROPOSED FINAL INSTRUCTION NO. 8

Duty to deliberate

Your answer to the question I pose to you must represent the considered judgment of each of you. In order to return an answer, it is necessary that each juror agree. Your answer must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without disregard of individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning an answer.

Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Authority: 3 Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, *Federal Jury Practice & Instructions*, § 106.01 (5th Ed., 2000 & rev. 2009) (as modified).

PROPOSED FINAL INSTRUCTION NO. 9

Use of depositions as evidence

During the trial, certain testimony has been presented by way of deposition. The deposition consisted of sworn, recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason is not present to testify from the witness stand may be presented in writing under oath or on a video recording. Such testimony is entitled to the same consideration and is to be judged as to credibility, and weighed, and otherwise considered by you, insofar as possible, in the same way as if the witness had been present and had testified from the witness stand.

Authority: 3 Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, *Federal Jury Practice & Instructions*, § 105.02 (5th Ed., 2000 & rev. 2009) (as modified).

PROPOSED FINAL INSTRUCTION NO. 10

Election of foreperson & jury interrogatory

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

Forms for your answer have been prepared for your convenience. The first question you must answer is: “Has the City proved by a fair preponderance of the credible evidence that it intends, in good faith, to begin construction of the Station 6 facility within the next fifteen (15) years? In making this determination you should not consider whether the City will have the funding to do so.”

You will note that this question calls for a “Yes” or “No” answer. The answer to this question must be the unanimous answer of the jury. You will take these forms to the jury room and, when you have reached unanimous agreement as to your answer, you will have your foreperson fill in, date and sign the form that sets forth the decision upon which you unanimously agree; and then return with your answer to the courtroom.

If the answer to the first question is “Yes,” you must also answer a second question. The second question is: “Has the City proved by a fair preponderance of the credible evidence that it intends, in good faith, to **use** the water from the Station 6 wells, within the next fifteen (15) to twenty (20) years, either to supply drinking water to its residents or to serve as a back-up source of drinking water if needed due to shortages in other sources of supply? In making this determination you should not consider whether the City will have the funding to do so.”

This question also calls for a “Yes” or “No” answer. The answer to this question must be the unanimous answer of the jury. You will take these forms to the jury room and, when you

have reached unanimous agreement as to your answer, you will have your foreperson fill in, date and sign the form that sets forth the decision upon which you unanimously agree; and then return with your answer to the courtroom.

Authority: 3 Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, *Federal Jury Practice & Instructions*, § 106.04 (5th Ed., 2000 & rev. 2009) (as modified).

PROPOSED FINAL INSTRUCTION NO. 11

Communications between court and jury during jury's deliberations

If it becomes necessary during your deliberations to communicate with me, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me by any means other than a signed writing, and I will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are for-bidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person—not even to me—how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous answer.

Authority: 3 Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, *Federal Jury Practice & Instructions*, § 106.08 (5th Ed., 2000 & rev. 2009).

PROPOSED FINAL INSTRUCTION NO. 12

Irrelevance of funding availability

In answering one or both questions presented on the jury questionnaire, you should not attempt to determine whether or not the City will have funding available, from public sources, to begin the construction of Station 6 within the next fifteen years. The City does not need to prove that it will have such funding available in order for you to answer either or both questions with a “yes.”

You are instructed to consider evidence relating to the City’s budgetary decisions *solely* for the purpose of establishing whether or not the City, in good faith, intends to build Station 6 for reasons *unrelated* to the availability of funding. The existence or potential availability of funding, as indicated or discussed in the context of the City’s budgetary decisionmaking processes, is of no concern during this phase of the trial.

Authority: 7/29/09 Pre-Trial Conference

PROPOSED FINAL INSTRUCTION NO. 13

Presence of other contaminants

The City contends that it was injured as a result of MTBE regardless of the presence of other contaminants besides MTBE in the water. The presence of other contaminants is not a defense to the City's claim that it was injured as a result of MTBE. During this phase of the trial, and in answering the questions presented to you, you may consider the presence of other contaminants only with respect to the question of whether the City intends, in good faith, to design and begin construction of a treatment facility at Station 6 within the next fifteen years.

Authority: 7/29/09 Pre-Trial Conference; *Cornell v. Exxon*, 558 N.Y.S.2d. 647 (3d Dept. 1990).

Dated: San Francisco, California

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MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Plaintiff City of New York
100 Church Street
New York, New York 10007
(212) 788-1568

/s/ MARNIE E. RIDDLE
VICTOR M. SHER (*pro hac vice*)
TODD E. ROBINS (*pro hac vice*)
JOSHUA G. STEIN (*pro hac vice*)
LESLEY E. WILLIAMS (LW8392)
NICHOLAS G. CAMPINS (*pro hac vice*)
MARNIE E. RIDDLE (*pro hac vice*)

SHER LEFF LLP
450 Mission Street, Suite 400
San Francisco, CA 94105
(415) 348-8300

Attorneys for Plaintiff City of New York